



Administrative Law Judge Floyd V. Palmer on December 10, 1993, and the exhibits attached thereto.

### **ISSUES**

The Administrative Law Judge, in his Preliminary Hearing Order dated January 6, 1994, found that claimant is entitled to medical treatment for his foot, but denied medical treatment for the back. Claimant contends that the Administrative Law Judge abused his discretion by failing to find that the claimant was entitled to workers compensation benefits for the back complaints. The issue now before the Appeals Board is whether claimant has experienced an injury to his back as a result of an accidental injury that arose out of and in the course of his employment with the respondent.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

For Preliminary Hearing purposes only, the Appeals Board, having reviewed the entire record, makes the following findings of fact and conclusions of law:

(1) The evidence fails to establish that claimant's back is injured as a result of an accident that arose out of and in the course of employment with the respondent. Therefore, the Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer, dated January 6, 1994, is affirmed in all respects.

In proceedings under the Workers Compensation Act, the burden of proof is on the claimant to establish his right to an award of compensation and to prove the various conditions on which his rights depend. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record. K.S.A. 44-501(a). The provisions of the Workers Compensation Act shall be applied impartially to those employers and employees in cases arising thereunder. K.S.A. 44-501(g).

Although the exact date or month is unknown, claimant alleges that in the Fall of 1992, he injured his back while helping a co-worker lift a concrete slab weighing approximately one-hundred (100) pounds. Claimant testified that although his back would spasm, he continued to work for the respondent until he was ultimately laid off in February of 1993. Claimant testified that his back did not improve from the date of accident and that when it would "go out" he would experience a spasm in his chest which he thought was related to his heart.

Claimant testified that he saw Dr. John Bernard in February of 1993 for flu-like symptoms, and apparently did not tell the doctor about his injury to his back. Claimant testified that on his second visit with Dr. Bernard, he told the doctor about back and foot complaints and the doctor prescribed medication and exercises for the foot. From this point, the record is somewhat confusing as claimant later states that he reported to Dr. Bernard that he thought he was having heart problems due to spasms in his chest.

Office notes from Dr. Bernard were introduced into evidence. Contrary to claimant's testimony, Dr. Bernard's notes indicate claimant saw him March 18, 1993, complaining of pain in his left foot. There is no mention in the doctor's records of back complaints on that date. Dr. Bernard's notes of March 31, 1993, indicate that claimant was complaining of a sharp pain, apparently in the chest, for which the doctor sent claimant for chest x-rays and other tests relating to cardiac evaluation. At this visit, claimant told the doctor that he

sometimes has pain on the outer part of his arm and it goes down into his fingers. Although claimant contends that he would experience the muscle spasms in his chest whenever his back would "go out", there is no notation in the medical records indicating that he gave this history to the doctor despite the fact that his testimony is to the effect that these problems were present since the alleged date of accident.

Claimant next saw Dr. Bernard on April 1, 1993, to review the tests concerning evaluation of claimant's heart. There was no mention of back complaints and the doctor indicates he felt that claimant was experiencing pain in the chest wall. On April 19, 1993, claimant again saw Dr. Bernard. The doctor's office notes indicate that claimant was complaining of his heel and that he had been experiencing tingling in his thumb, index, and third fingers when driving. Again, no mention is made of back complaints.

Should the Appeals Board accept claimant's testimony of the facts surrounding the alleged accident and the severity of his symptoms, it is not reasonable to believe that Dr. Bernard would have failed to note in his records that claimant's spasms in his chest corresponded to his back "going out". Also, as Dr. Bernard noted other symptoms that claimant was having in addition to his foot pain, such as the pain in the arm contained in the office notes of March 31, 1993, and the tingling of the fingers contained in the office notes of April 19, 1993, it is not reasonable under these circumstances to believe that the doctor would have merely disregarded the back complaints and omitted them from his records if, in fact, claimant had made such complaints.

Based upon the evidence presented to date, the Administrative Law Judge was correct in his decision that the claimant has failed to establish that he has experienced a back injury arising out of and in the course of his employment with the respondent.

(2) The Appeals Board hereby adopts the findings and conclusions set forth by Administrative Law Judge Floyd V. Palmer in his Order of January 6, 1994, that are not inconsistent with the findings and conclusions specifically set forth herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer dated January 6, 1994, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 1994.

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BOARD MEMBER

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